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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1088

JAMES J. LAUGHLIN and
ALLAN U. FORTE, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JAMES J. LAUGHLIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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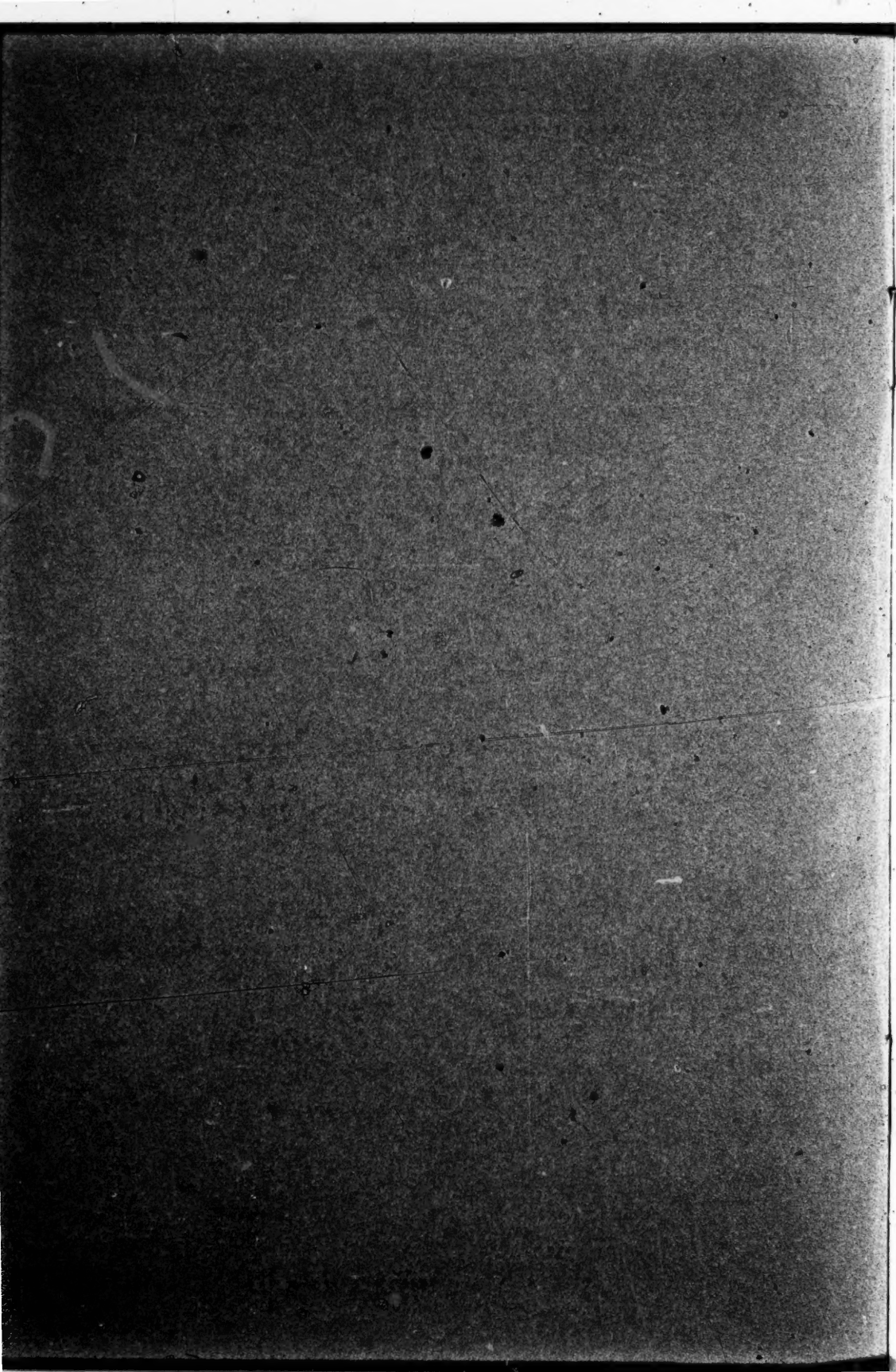

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners James J. Laughlin and Allan U. Forte pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cases on July 28, 1967.

CITATIONS TO OPINIONS BELOW

This petition seeks review of two related decisions of the court of appeals. The first involved a conviction of Petitioners Laughlin and Forte on a charge of conspiracy to obstruct justice and endeavoring to influence a witness (herein "the conspiracy charge"). 385 F.2d 287 (D.C. Cir. 1967). The second involved a conviction of Petitioner

Laughlin for perjury (herein "the perjury charge"). 385 F.2d 295 (D.C. Cir. 1967). The court of appeals had previously reversed an earlier conviction on the conspiracy charge, 344 F.2d 187 (D.C. Cir. 1965). The district court has also dismissed the initial perjury indictment because of the presentation of illegal wiretap evidence to the grand jury. *See* 222 F.Supp. 264 (D.D.C. 1963); 223 F.Supp. 623 (D.D.C. 1963); 226 F.Supp. 112 (D.D.C. 1964).

JURISDICTION

The judgments of the court of appeals were entered on July 28, 1967. A timely petition for rehearing *en banc* was denied on December 26, 1967. Mr. Chief Justice Warren extended the time within which to file this petition to and including February 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Grand Jury's reliance upon illegal wiretap evidence in returning the conspiracy indictment violates the Fourth and Fifth Amendments to the Constitution, contravenes the Exclusionary Rule, and therefore requires dismissal of the Indictment.[1]

2. Whether, as a matter of Due Process and pursuant to the Exclusionary Rule, a defendant has standing to move to exclude incriminating testimony of a witness, where such testimony has been unlawfully coerced.[2]

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[1] This question is presented only in the conspiracy convictions, Nos. 19562-63, below.

[2] This question is presented both in the conspiracy convictions, Nos. 19562-63, below, and the perjury conviction, No. 20327, below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonble searches and seizures, shall not be violated . . ."

Fifth Amendment to the Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor be deprived of life, liberty, or property, without due process of law . . ."

Section 605, Communications Act of 1934, 47 U.S.C. § 605:

> " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

STATEMENT OF THE CASE

In order to place the constitutional issues raised here in proper context, it is necessary to trace briefly the background leading to the instant prosecutions. In 1961, petitioner Forte was indicted and tried on a charge of abortion. Petitioner Laughlin was his counsel. Forte's defense centered on his assertion that the abortion charge was a fabrication and part of a "shakedown" engineered by Detective Wallace, a Washington, D. C. policeman. Forte's trial ended in a verdict of acquittal. His accusations as to the "shakedown" triggered a grand jury investigation into these charges. *See,* 385 F.2d at 289.

As the court below noted, "the evidence [before the Grand Jury] soon drifted away from the accusation directed at Sgt. Wallace,"[3] and the investigation focused upon

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[3] 385 F.2d at 289.

the conduct of petitioners.[4] The most significant witness before the grand jury was a Baltimore policewoman, Mrs. Bernice Gross, who on her first appearance before the grand jury on the morning of March 1, 1963 testified that she had no connection with petitioner Forte or Detective Wallace.

Immediately following that testimony, Mrs. Gross was taken into the office of the United States Attorney and interrogated for about two hours. The transcript of that interrogation, which tends to prove that Mrs. Gross was coerced to change her story, is set forth in pertinent part in Appendix C. The court of appeals acknowledged that Mrs. Gross' statements were "obtained under possible coercive circumstances." 385 F.2d at 293. In this connection, the court of appeals noted that the prosecutor:

> " . . . warned that [Mrs. Gross] might be prosecuted for perjury unless she told 'the truth about what happened.' The Assistant United States Attorney in charge of the grand jury proceeding, . . . promised that he would ask the grand jury to be lenient in considering Mrs. Gross's part in dealing with Mrs. Smith, if it appeared that Mrs. Gross would be a witness against Laughlin and Forte." 385 F.2d at 289-90.

Mrs. Gross was forthwith brought back before the grand jury where she reversed her story and asserted that she had attempted to dissuade a witness from testifying.. 385 F.2d at 290. Then the prosecutor asked, in the presence of the grand jury, if Mrs. Gross would make telephone calls to petitioners Laughlin and Forte and allow the Government to record the conversations. Mrs. Gross first refused; then, fol-

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[4] In this connection, the court of appeals noted,

> ". . . we are at least surprised that Wallace, who was himself an object of the grand jury's investigation, should be used as an investigator. The effect may well have been equivalent to an endorsement of his trustworthiness by the United States Attorney's Office." 385 F.2d at 292.

lowing threats from the Deputy Foreman of the grand jury, she acquiesced. *Ibid.* It was this "consent" which the courts below found was coerced, with the result that the wiretaps were illegal.

Four telephone calls from Mrs. Gross to Laughlin were illegally intercepted by the Government. At least one of them, and possibly all of them, were played to the grand jury. 385 F.2d at 290; 344 F.2d at 189.

It should be emphasized that the grand jury not only *received* the illegal wiretap evidence, but actively participated in *procuring* it. The record in this case makes it absolutely clear that the statements of the Deputy Foreman of the grand jury constituted a major element in the coercion of Mrs. Gross to consent to the illegal wiretap. The key instance of such coercion, referred to specifically by the district court, came in the following colloquy between the Deputy Foreman, the prosecutor, and Mrs. Gross:

> "DEPUTY FOREMAN: [Mr. Prosecutor], I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room, that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.
>
> "[PROSECUTOR] : Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?
>
> "A. Okay."

(*See*, 222 F.Supp. at 267).

Significantly, Judge Youngdahl found that the grand jury was an active participant in securing the illegal evidence:

> " . . . the statements of both [the prosecutor] and *the deputy foreman of the grand jury*, as quoted above, amounted to an implied promise that if Mrs. Gross consented to having the recordings made, she would not be indicted for perjury. Thus there was a clear 'hope of leniency', *supra*, in Mrs. Gross's mind, which hope was deliberately created by the implied promises of both [the prosecutor] *and the deputy foreman*. Her consent, under the implied threat of being indicted if she did not cooperate and under the implied promise that she would not be indicted if she did cooperate, is not the kind of 'authorization' contemplated by 47 U.S.C. § 605, as Weiss makes abundantly clear. Mrs. Gross has not been indicted by the grand jury." 222 F.Supp. at 268-69. (Emphasis added.)

The grand jury returned two indictments.[5] The first was the conspiracy charge against both petitioners; Mrs. Gross was charged as a co-conspirator, but was not indicted.[6] The

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[5]There can be no question that the wiretaps had a significant effect upon the Grand Jury. The interplay of the illegal wiretaps with the testimony of the witnesses who had appeared before the Grand Jury has already been discussed in a decision reversing petitioners' initial conspiracy conviction, 344 F.2d 187. That decision considered the prejudicial effect, *at trial*, of the introduction of the illegal wiretaps. There is no justifiable distinction, we believe, between the effect of these recordings upon the petit jurors and grand jurors. After reviewing the evidence presented at trial, the court made the following finding on the impact of the illegal recordings:

> "In the recorded conversations, the parties apparently assume the occurrence of the transactions which Mrs. Gross had related. After hearing the recordings, the jury would certainly tend to give more credence to Mrs. Gross' entire testimony than if they had not heard them. Since the conviction of appellants on each count depended heavily on the testimony of Mrs. Gross, we cannot say that there was not 'a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Id.* at 192-93.

[6]The conspiracy charge asserted that petitioners had conspired to influence the actions of Mrs. Smith as a material witness in the abor-

second indictment was the perjury charge against petitioner Laughlin.[7]

The two issues raised by this petition were squarely considered in the proceedings below. The question of the illegal wiretap evidence initially was raised on petitioner's first trial for perjury. There, the wiretaps were introduced, over objection, as evidence that Laughlin knew Mrs. Gross. The district court found that the recordings were illegally obtained, declared a mistrial, 222 F.Supp. 264, and dismissed the initial perjury indictment because:

> "Evidence was presented to the Grand Jury in this case which was in disregard of the accused's rights and was obtained even in the face of 47 U.S.C. § 605." 226 F.Supp. at 114.

In this regard, the district court found that:

> " . . . there may be competent evidence and illicit evidence before the grand jury and the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the grand jury did not in fact return the indictment primarily influenced by the illicit evidence. That the Court considers the case here." *Id.*

The district court refused, without amplification, to dismiss the companion conspiracy indictment at that time. 223 F.Supp. at 626. At the first conspiracy trial the Government again introduced the illegal wiretaps in evidence, even though they had previously been declared illegal in the perjury trial. After conviction, the court of appeals reversed. 344 F.2d 187.

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tion case against Forte. It also charged each petitioner with the substantive offense of corruptly endeavoring to influence witness Smith. 18 U.S.C. §§ 371, 1503.

[7]The perjury charge was based on Laughlin's denial to the Grand Jury that he had ever talked to Mrs. Gross. 18 U.S.C. § 1621. *See* 222 F. Supp. at 264.

On remand, petitioners again moved to dismiss the conspiracy indictment "for the reason that unlawful evidence was used before the Grand Jury . . . ." Plaintiff's Motion To Dismiss the Indictment, Cr. 600-63, dated May 7, 1965. The Government conceded that unlawful evidence "was indeed placed before the grand jury which returned the [conspiracy] indictment . . . ." Government Memorandum in Opposition to Motion To Dismiss the Indictment, Cr. 600-63, dated May 19, 1965. On May 24, 1965, the court denied the motion to dismiss, without opinion.

The second issue, the standing to challenge coerced testimony from a witness, was raised in both prosecutions. At the second perjury trial, petitioner attempted, without success, to exclude Mrs. Gross' testimony on the ground it was coerced. The Government responded that even though the testimony was coerced, this raised only the question of credibility, not exclusion, of her testimony.[8]

Likewise, this issue was raised in the conspiracy trial. There, "[t]he Government's case consisted basically of the testimony of Mrs. Smith and Mrs. Gross, which was generally consistent with their testimony before the grand jury." 385 F.2d at 291. Petitioners moved to exclude Mrs. Gross' testimony on the ground it was coerced.[9] The court rejected that argument, holding:

> THE COURT: "... let's assume it was coerced from her at the time by the United States' Attorney's Office. . . . Yet if she was in here and is willing to take the witness stand and testify to the very same

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[8] In his Motion to Dismiss the Indictment, Cr. No. 406-65, dated Jan. 27, 1966, petitioner Laughlin asserted that the "use of coerced testimony against defendant violated the due process clause. . . ." *And see,* Government Response to Motion to Dismiss, Cr. 406-65, dated Feb. 16, 1966, p. 22 (petitioner "would have no standing to exclude her testimony.") *See also,* Transcript, Cr. No. 406-65, pp. 1285-88.

[9] Transcript, Crim. No. 600-63, p. 203.

> facts, doesn't it go to the weight the jury should give rather than its admissibility.
>
> * * *
>
> THE COURT: " . . . What you are really coming down to, then is, was this evidence that she would give coerced out of this witness by the United States Attorney.
>
> * * *
>
> "I am going to hold, that that goes to the weight and the credibility. And it will be heard in front of the jury, and you can argue on it. You can argue the weight."*10*

The Government below defended that ruling on the ground that "even if appellants had shown that Mrs. Gross had been coerced into testifying, appellants would not [have] standing to object to her testimony." Brief for Appellee, Nos. 19562-63, Ct.App.D.C., p. 34.

Two separate panels of the court of appeals heard the appeals which raised essentially the same issues. On July 28, 1967, the panel reviewing the conspiracy convictions filed an opinion, 385 F.2d 287, which held:

(i) that even though the prosecutor had presented illegal wiretap evidence to the Grand Jury, which had relied upon it in returning its indictment, as long as there was "ample competent evidence" before the Grand Jury, the use of the illegal evidence was essentially "harmless error" and the indictment was valid, and

(ii) that petitioners had no standing to exclude Mrs. Gross' highly-incriminating testimony which petitioners assert was coerced; their only remedy was to challenge the credibility of Mrs. Gross.

The panel reviewing the perjury conviction affirmed *per curiam*, 385 F.2d 295.

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*10*Transcript, Crim. No. 600-63, pp. 218, 223.

REASONS FOR GRANTING THE WRIT

I.

The Grand Jury's Use of Illegal Evidence in Returning the Conspiracy and Corruption Indictment

The fundamental issue here is whether the *Costello* decision,[11] which permits the use of inadmissible evidence before the grand jury, also sanctions the use of illegal evidence before the grand jury. In considering this question, lower courts have developed conflicting and widely differing standards.

There can be no question here that a central element in the prosecutor's presentation to the Grand Jury leading to the return of the conspiracy indictment was the introduction of recordings which have been held, beyond any dispute, to be illegal wiretaps in violation of Section 605 of the Communications Act of 1934. *Laughlin v. United States*, 385 F.2d at 291; 344 F.2d at 192; 226 F.Supp. at 114; 223 F.Supp. at 625, 626; 222 F.Supp. at 268-69. Indeed, the Grand Jury's reliance upon this same illegal wiretap evidence earlier led Judge Curran to dismiss the original perjury indictment. 226 F.Supp. 112; 223 F.Supp. 623.

The Court should grant certiorari to consider whether the conceded use of illegal wiretap evidence before the grand jury is consonant with controlling constitutional and exclusionary standards.

A. *The Rulings Below Sanctioning Use of Illegal Wiretap Evidence Before the Grand Jury Are Contrary to this Court's Decisions Excluding Illegal Evidence.*

This petition raises serious and significant questions as to the scope and integrity of the Exclusionary Rule which this Court fashioned in *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 302 U.S. 379 (1937); 308 U.S. 338 (1939); and *Elkins v. United States*, 364 U.S.

[11] *Costello v. United States*, 350 U.S. 539 (1956).

206 (1960). There can be no question that the rulings of this Court require the exclusion of illegal wiretap evidence at all stages of the criminal trial. Consistent with a due regard for fair procedures, the Solicitor General has stated that "the Federal Government has abandoned the use of electronic eavesdropping for prosecutorial purposes." *Berger v. New York*, 388 U.S. 41, 62 (1967). Further, although the exclusionary policy as to wiretap evidence in the past has rested upon statutory grounds, the recent *Berger* and *Katz* decisions make it abundantly clear that the statutory restrictions against intercepting telephone conversations have a constitutional foundation.[12] *Berger v. New York, supra; Katz v. United States*, ___ U.S. ___ (1967). As the Court stated in *Berger*,

> "Federal law, ... prohibits interception and divulging or publishing of the content of wiretaps *without exception.*" 388 U.S. at 48. (Emphasis added.)

We believe that the Exclusionary Rule must properly apply to grand jury proceedings, the initial formal stage of the criminal prosecution, just as it does at trial. In explaining the Exclusionary Rule, the Court has stated:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States, supra*, 364 U.S. at 217.

In terms of "removing the incentive" and denying the prosecutor the benefit of illegal evidence, there is no justifiable distinction between the indictment stage of a proceeding and the trial stage. In this connection, it has been observed that, "To the extent that the grand jury provides a forum

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[12] It is noteworthy that the Government below indicated that the violation of constitutional rights, as contrasted with statutory rights, might be sufficient to vitiate the indictment. Government's Memorandum In Opposition to Motion to Dismiss the Indictment, Cr. 600-63, May 19, 1965.

in which illegally obtained evidence can be utilized, the exclusionary policy articulated in *Weeks v. United States*, 232 U.S. 383 (1914), will be undermined."[13]

This issue has never before been squarely considered by the Court.[14] However, in the 1966 Term, the Solicitor General implicitly acknowledged the constitutional issue raised by using illegal evidence to influence a grand jury's decision. See *West v. United States*, No. 215 Misc., Oct. Term 1966, Brief for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari. There, the Solicitor General emphasized that in the factual situation in *West*, there could not have been any prejudice because the illegal evidence did *not* relate to the count of the indictment on which petitioner was tried and convicted.[15] However, the Solicitor General distinguished the *West* case in the following critical terms:

> "There is no basis, therefore, for concluding that the suppressed evidence influenced the grand jury's decision to indict with respect to the transfer charge. [The *West*] case thus does not present the question

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[13]Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 Yale L.J. 590, 595 (1963). The Court of Appeals for the Eighth Circuit has reached the opposite conclusion. *West v. United States*, 359 F.2d 50, 56 (8th Cir.1966), *cert. denied*, 385 U.S. 867 (1966). However, in that case it was conceded that the illegal evidence had no connection whatsoever with the count of the indictment upon which West was tried.

[14]In the venerable decision of *Holt v. United States*, 218 U.S. 245, 247-48 (1910), in an ambiguous factual situation, the Court refused to dismiss an indictment where "evidence in its nature competent, but made incompetent by circumstances [not otherwise defined], had been considered along with the rest" by the grand jury. *Id.* at 248. Significantly, *Holt* was decided four years before *Weeks v. United States, supra*, which established the federal exclusionary rule for illegally seized evidence.

[15]A separate count based upon illegal evidence was dismissed by the trial court.

whether an indictment wholly or substantially based upon illegally seized evidence can support a conviction." *Id.*

The instant petition, of course, squarely presents the very question whether an indictment "substantially based upon illegally seized evidence can support a conviction."

Moreover, in *Lawn v. United States*, 355 U.S. 339 (1958), the Court considered only the issue of whether the "unsupported suspicion" that illegal evidence had been used before the grand jury was sufficient to require the trial court to convene a full evidentiary hearing to review the grand jury proceedings. The Court emphasized that defendants there had laid "no foundation" for a hearing.[16] 355 U.S. at 349. In the instant case, of course, there is no need to rely on "suspicion." It is conceded that unlawful wiretap evidence was presented to, and relied upon by, the Grand Jury.

Finally, in the recent decision in *United States v. Blue*, 384 U.S. 251 (1966), the Court rejected a proposition not at issue here: that the mere fact of securing evidence illegally, without any other use, barred the prosecution entirely and granted defendant complete immunity from prosecution. It was not contended in that case that illegal evidence was ever presented to the grand jury.[17]

Significantly, in the *West*, *Blue* and *Lawn* cases, the Solicitor General did *not* argue that federal prosecutors

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[16] Indeed, the clear inference is that if a foundation *had* been laid, *i.e.*, if there was some persuasive evidence of the use of illegal evidence before the grand jury, then a hearing to consider dismissing the indictment would have been required.

[17] In this factual context, we believe that the statement in footnote 3 to the *Blue* opinion—that "in any event our precedents indicate [that presenting "tainted evidence" to the grand jury] would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether"—was dictum. 384 U.S. at 255. Further, as we point out herein, the precedents relied upon—*Costello* and *Lawn*—do not stand for the cited proposition.

should be free to present illegal wiretap evidence to the grand jury. This is, however, precisely the effect of the appellate decision challenged here.

B. *The Court Should Grant Certiorari To Consider the Effect of the Costello Decision as Applied to Illegal Evidence.*

Costello v. United States, supra, did not sanction the use of *illegal* evidence before a grand jury. It merely permitted grand juries to deliberate unencumbered by "technical rules" of evidence. Thus, *Costello,* upon which the court below relied, affords no justification for the use of illegal wiretap evidence before a grand jury.

It is essential that *Costello* be carefully analyzed, because one statement from that case has been widely—and improperly—cited to justify the broadside use of illegal evidence before grand juries.[18] *Costello* held that hearsay evidence could be used before a grand jury to support an indictment. However, it is perfectly clear that the Court considered that the inadmissibility of hearsay was merely a "technical rule" of evidence from which grand juries have traditionally been free. The Court stated that,

> " . . . in this country as in England of old the grand jury has convened as a body of laymen, *free from technical rules,* acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." 350 U.S. at 362. (Emphasis added.)

The Court found that to sustain petitioner's contention that hearsay was an inadequate basis for an indictment,

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[18] That statement is:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits." 350 U.S. at 363.

> "would run counter to the whole history of the grand jury institution, *in which laymen conducted their inquiries unfettered by technical rules.*" *Id.*, at 364. (Emphasis added.)

Although it is not unreasonable to conclude that a grand jury can properly proceed "unfettered" or "uninhibited" by formal and technical rules of evidence, it is a totally different matter where the evidence is *illegal*—secured, as here, by the prosecutor in violation of federal law, with the active participation of the grand jury.[19]

Section 605 of the Communications Act of 1934 forbidding wiretapping is, of course, no "technical rule." It prohibits any unauthorized persons "from violating the integrity of a telephone conversation. . . ." *United States v. Tane*, 329 F.2d 848, 852 (2d Cir. 1964). "[E]vidence acquired from a statutory violation [of Section 605] may not be used to obtain a federal conviction." *Id.* In enacting the prohibitions of Section 605, Congress outlawed "resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." *Nardone v. United States*, *supra*, 302 U.S. at 383. See also *Nardone v. United States*, *supra*, 308 U.S. at 340. Moreover, as we have noted, the statutory prohibitions against interceptions of private mes-

[19] Judge Edgerton, in a concurring opinion in *Jones v. United States*, 342 F.2d 863, 872 (D.C. Cir. 1964), placed the statement from *Costello*, noted in fn. 18, *supra*, in its proper—and limited—perspective:

> ". . . We do not understand the Court's opinion to say anything about any other constitutional question. Due deference forbids us to interpret the opinion as containing a vast dictum to the effect that the entire Constitution, including all its Amendments, 'requires nothing more'; in other words, that the proceedings of a legally constituted and unbiased grand jury may violate any number of the defendant's constitutional rights, including his right to the assistance of counsel and his privilege against self-incrimination, without affecting the validity of the indictment. *Costello*, therefore, is no bar to our view that an indictment obtained in violation of constitutional rights must be dismissed. . . ."

sages have now assumed the dimensions of constitutional protections. *Berger v. New York, supra; Katz v. United States, supra.*

Thus, *Costello* properly stands for no broader principle than the authorization for a grand jury to deliberate without the interference of technical evidentiary standards. This is far from justifying the use of illegal evidence which, we believe, should require the dismissal of the indictment.

Such a rule would give proper recognition to the "high place [the grand jury has] held as an instrument of justice." *Costello v. United States, supra,* 350 U.S. at 362. "The basic purpose of the English grand jury was to provide a fair method of instituting criminal proceedings against persons believed to have committed crimes." *Id.* The grand jury,

> "has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated . . . by malice and personal ill will." *Wood v. Georgia,* 370 U.S. 375, 390 (1962).

Indeed, if the appellate holding which sanctions the use of illegal evidence is sustained, the grand jury as a forum for the protection of the defendant will be substantially impaired. That body will be free to secure and act at will upon illegal evidence supplied by prosecutors. Moreover, this standard can promote the procuring of illegal evidence, because prosecutors will be secure in the knowledge that they can use such evidence before a grand jury, although that evidence cannot be introduced at trial. Appropriate exclusionary policies—designed to effect compliance with federal statutes by law enforcement officials—require that illegal evidence not be utilized as the basis of a prosecution—at the indictment *or* the trial stages.

C. *The Court Should Grant Certiorari To Establish a Definitive and Uniform Standard Relating to the Use of Illegal Evidence Before the Grand Jury.*

Further, the Court should consider this important matter on certiorari to meet its supervisory responsibilities. Lower courts—presently struggling with the *Costello* opinion as applied to illegal evidence—have developed a variety of conflicting, inconsistent standards. Thus, there is no even-handed application of a uniform standard in the trial courts; this conflict among the lower courts results in the situation where the presentation of illegal wiretap evidence to the grand jury will, in some courts, result in the dismissal of the indictment; in other courts, the illegal evidence merely will be weighed against the other "competent evidence" which the grand jury considered. This conflict should be resolved.

A review of the opinions of lower courts illustrates this disparity. The court of appeals below applied the *Costello* rule that, even though the prosecutor used illegal evidence to secure the indictment, the indictment was nevertheless valid if "there was ample competent evidence before the grand jury . . . ." 385 F.2d at 291. In *United States v. Tane, supra,* the district court dismissed an indictment based "almost exclusively" upon evidence which had been secured by an illegal wiretap. 329 F.2d at 854. In *United States v. Guglielmo,* 245 F.Supp. 534, 536 (N.D.Ill. 1965), the court dismissed the indictment, holding that "but for" the illegal wiretap evidence presented to the grand jury, there would have been no indictment. It found that the indictment, "tied ineluctably with the illegal wiretapping must be and accordingly [is] hereby dismissed." In *United States v. DiGrazia,* 213 F.Supp. 232 (N.D.Ill. 1963), the court dismissed the indictment as to one defendant although he had made "no direct incriminating statement," *id.* at 234, holding:

> " . . . There is no way to know whether in fact his appearance was incriminating in the minds of some

> or all the members of the Grand Jury. Certainly on the record before me, I cannot say that his testimony might not have tended to incriminate him.
>
> * * *
>
> "Whether constitutional rights have been respected should not be the subject of speculation. Where, as here, there is doubt, the only proper action is to dismiss the indictment."

As to the second defendant in *DiGrazia*, "it [was] conceded that she gave no incriminating testimony before the Grand Jury." *Id.* The Court explained this dismissal of the indictment as follows:

> " . . . there is no way of knowing on what basis the Grand Jury returned the indictment against Rose Calzavara. In fact, absent any record of the proceedings, there is no way to ascertain accurately whether any other evidence at all involving her was presented. But even assuming the presentation of other evidence which, in itself, would have warranted the indictment, it must necessarily be pure speculation as to whether that evidence or the prejudicial conduct of the prosecutor or both prompted the Grand Jury's action." *Id.* at 235.

And, at an earlier stage in this case, the district court dismissed the original perjury indictment, holding that the presentation of illegal wiretap evidence to the Grand Jury required the dismissal of the indictment, *even if additional lawful and competent evidence* had been presented to the Grand Jury which, by itself, might have supported the indictment.[20]

Finally, it should be noted that certain lower courts have held that there is no distinction at all between presenting

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[20] Judge Curran ruled:

> ". . . an indictment based on incompetent evidence, even though returned by a legally constituted and unbiased grand jury, should not be allowed to stand. If this were not so,

illegal and hearsay evidence to a grand jury. *United States v. Birrell*, 242 F.Supp. 191, 205 (S.D.N.Y. 1965); *United States v. Grosso*, 225 F.Supp. 161, 175 (W.D. Penn. 1964); *United States v. Block*, 202 F.Supp. 705, 707 (S.D.N.Y. 1962).

This wide disparity of standards is a telling demonstration that the Court should grant certiorari to establish, once and for all, a clear and simple standard—that *any* use of illegal wiretap evidence before a grand jury vitiates the indictment.

II.

Defendant's Standing To Exclude the Coerced Incriminating Testimony of a Witness

The Court should also grant certiorari to consider whether petitioners had standing to exclude Mrs. Gross' testimony which had initially been "obtained under possible coercive circumstances. . . ." 385 F.2d at 293. Petitioners' assertion was that Mrs. Gross had been coerced before the Grand Jury into testifying against them under threat of prosecution and that threat continued to the time of the trial. To reverse her story would have subjected her to indictment with the other principals, as well as to a perjury charge for presenting a story different than that which was allegedly

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the only reason the trial court could order the disclosure of grand jury proceedings would be where a proper case had been made alleging bias.

* * *

"It is also true that an indictment will not be dismissed if there is some incompetent evidence before the grand jury, as long as there is sufficient competent evidence to sustain it. However, there may be competent evidence and illicit evidence before the grand jury and the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the grand jury did not in fact return the indictment primarily influenced by the illicit evidence. That, the Court considers to be the case here." 226 F.2d at 114.

coerced from her before the Grand Jury. In these circumstances, petitioners moved to present evidence of coercion prior to introduction of her testimony and, on that basis, to exclude that testimony.

The district court and the court of appeals held that petitioners could not object to the introduction of the testimony, even if it was coerced. The court of appeals did not reach the issue of whether, in fact, Mrs. Gross' testimony was coerced. Rather, it assumed that it was; the court held, nevertheless, that petitioners could not move to exclude it, but were left only with discrediting it on cross-examination. 385 F.2d at 291.

This important issue has never been decided by this Court. However, the ruling below is inconsistent with recent Supreme Court decisions justifying the exclusion of evidence secured in violation of a constitutional mandate. Further, in any event, as a matter of due process, coerced testimony should be excluded on the motion of any person implicated by such testimony, because of the basic unreliability of such testimony and because the receipt of this seriously prejudicial and incriminating evidence deprives a defendant of a fair trial.

A. *The Court of Appeals' Reliance Upon a "Personal Rights" Theory of Standing To Exclude Coerced Testimony Is Inconsistent With This Court's Justification of the Exclusionary Rule on the Grounds of Deterrence.*

The lower courts' refusal to consider petitioners' motion that Mrs. Gross' testimony be excluded at trial because it was coerced is based upon a narrow view of those persons who can complain about a violation of a third party's constitutional rights. The court of appeals' reasoning proceeds upon,

> " . . . the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitu-

> tional protection is given.'" *Jones v. United States*, 362 U.S. 257, 261 (1960).

Thus, in *Jones v. United States*, this Court held, as regards standing to challenge illegally seized evidence, that,

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U.S. at 261.

Subsequently, in *Wong Sun v. United States*, 371 U.S. 471, 492 (1963), in a brief comment, this Court held that a defendant could not challenge the introduction of evidence illegally seized from a third party.

Proceeding on this narrow theory, it could be said—as the court of appeals apparently did—that the only person whose rights were violated when Mrs. Gross was coerced to confess was Mrs. Gross herself. If she did not complain, no one could.

This stringent reading of the requisites of standing to challenge evidence illegally secured cannot be squared with more recent Supreme Court decisions explaining the Exclusionary Rule. Thus, in *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), the Court "abandoned the personal incrimination theory and accepted a general deterrence rationale, pointing out that the real persons the exclusionary rule seeks to protect are the unknown potential victims of unreasonable police conduct."[21] There, the Court concluded that:

> " . . . 'in rejecting the Wolf doctrine as to the exclusionary rule [that the rule does not apply to the states] the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. . . .'" 381 U.S. at 637.

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[21] Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342, 352-53 (1967).

Subsequently, in *Tehan v. United States ex rel Shott*, 382 U.S. 406, 413 (1966), dealing with self-incrimination, deterrence of illegal conduct was characterized as the "single and distinct" purpose of the Exclusionary Rule.

These later cases require, we believe, a full-scale reassessment of those persons who have standing to challenge illegal evidence.[22]

The Exclusionary Rule, based on the rationale of deterrence, has recently been characterized as follows:

> "The underlying assumption of the rule is that the incentive for conducting illegal searches and seizures will be largely destroyed if prosecutors are barred from using the fruit in a criminal prosecution. And it is argued that if the incentive is reduced, the police will have less reason to violate the individual's right of privacy." *United States ex rel De Forte v. Mancusi*, 379 F.2d 897, 904 (2d Cir. 1967).

We believe that the same rule must apply to confessions and testimony which are the product of coercion by the police or prosecution. As the Supreme Court said in *Spano v. New York*, 360 U.S. 315, 320-21 (1959):

> "The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

To deter, to remove the incentive to coerce confessions, the prosecution should have no right, at any place and in

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[22] "*Linkletter* and its progeny add up to the conclusion that the Court is now operating under a general deterrence theory of the exclusionary rule. Since the *Jones - Wong Sun* standing doctrine has never been examined under this theory, a reappraisal of its current validity is in order." Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342, 356 (1967).

any forum, to exploit them.[23] This rule has long been accepted in California, where Mr. Chief Justice Traynor has written:

> " . . . 'Since all the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights.'" *People v. Martin*, 45 Cal.2d 755, 761, 290 P.2d 855, 857 (1955).

Moreover, a recent decision of the California Supreme Court has applied that rule to instances where a witness' testimony is coerced. In *People v. Varnum*, 427 P.2d 772, 775-76 (1967), the California Supreme Court "decided a defendant could . . . assert the due process rights of another suspect who is himself never prosecuted."[24] We believe that the standing rule as developed in California most clearly comports with appropriate federal standards.

In light of the *Linkletter* and *Tehan* decisions of this Court, *supra*, and the conflicting constitutional principles advanced in *Martin* and *Varnum*, we believe that the Court should grant certiorari to determine whether those decisions require the rejection of a standing theory based on the obsolete "personal rights" concept and its replacement with a rule of standing providing the broadest impact for the ex-

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[23] *Cf., Comment, Developments in the Law - Confessions*, 79 Harv. L. Rev. 938, 969 (1966):

> "The Court has been seen as treating 'outrageous' or 'illegal' conduct during interrogation as the unconstitutional primary activity of the police; the exclusionary rule for confessions, like that in the search and seizure cases, is thought to provide an effective remedy to victims of improper conduct and to deter improper interrogations by removing any incentive to engage in them."

[24] Note, 81 Harv. L. Rev. 707, 711 (1968).

clusionary rules—to deter illegal prosecutional and police practices.

B. *Coerced Testimony Should Be Excluded Upon Challenge by Any Person Incriminated by Such Testimony Because of the Basic Unreliability of the Testimony*

Even if this Court adheres to the ruling in *Jones* and *Wong Sun* denying a defendant's standing to challenge illegally seized evidence from a third person, a different rule should prevail in the case of coerced testimony.

Beyond any dispute, illegally seized evidence is itself reliable and intrinsically competent evidence; it is excluded to require adherence to the constitutional mandate. In contrast, however, coerced confessions or coerced testimony are essentially unreliable. Since they are the product of duress, one cannot rely upon their veracity. This very fact of their unreliability is a major reason why coerced confessions have been excluded. See *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *Stein v. New York*, 346 U.S. 156, 192 (1953); *Watts v. Indiana*, 338 U.S. 49, 57, 59-60 (1949) (concurring opinion); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944); *Chambers v. Florida*, 309 U.S. 227, 240 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936).

Any person implicated by coerced testimony should have, as a matter of due process, the right to challenge essentially unreliable testimony. To the degree that due process requires that coerced *confessions* be excluded because of their unreliability, it is indefensible to fashion a rule which would admit coerced *testimony* from witnesses, which is even less reliable. Likewise, to the degree that coerced confessions are excluded "to prevent fundamental unfairness in the use of evidence, whether true or false,"[25] there is no justification for distinguishing between coerced confessions and coerced testimony. The use of improper physical or psychological force against a *witness* is just as incon-

[25] *Lisenba v. California*, 314 U.S. 219, 236 (1941).

sistent with the standards of our accusatorial system of criminal law as is its use against a *defendant. Cf. Rogers v. Richmond,* 365 U.S. 534, 540-41 (1961). "It is difficult to see how a fair trial can be maintained when the most damaging testimony against the defendant consists of something the witness might never have said, but for the pressure applied to him."[26]

Indeed, coerced testimony incriminating a third party is even more unreliable than a coerced confession. A confession will implicate the speaker. How much easier it is for a speaker, under coercion, to implicate a third party. Thus, to the degree that coerced confessions are excluded because of their unreliability and to insure a fair trial, so must be coerced testimony secured under the same circumstances implicating a third party.

The lower court's suggestion that any prejudice can be vitiated by the defendant's cross-examining the coerced testimony is clearly insufficient. In the parallel coerced-confession situation, such unreliable evidence is excluded entirely.

The inadequacies of relying upon cross-examination to cure the defect is aptly demonstrated here. The court below *assumed* that Mrs. Gross' testimony before the Grand Jury implicating petitioners was coerced. Mrs. Gross thereafter testified in a fashion consistent with her coerced testimony before the Grand Jury. At trial, it is perfectly clear that Mrs. Gross was in the position of being forced to persist in her earlier story, whether it was true or not, because to testify otherwise would risk a perjury conviction and subject herself to the possibility of being joined in the indictment which was the basis for the assumed coercion in the first place. Obviously, in the face of these circumstances, granting the defendant the opportunity to cross-

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[26] *Comment, The Right of a Criminal Defendant to Object to the Use of Testimony Coerced from a Witness,* 57 Nw.U.L. Rev. 549, 555 (1962).

examine Mrs. Gross simply cannot provide adequate redress for the essential unreliability and unworthiness of her testimony. This testimony should be excluded outright.

This serious constitutional issue has been recognized in *Turner v. Pennsylvania*, 338 U.S. 62, 65-66 (1949). The opinion of Mr. Justice Frankfurter referred to the question of "exclusion of statements by co-principals not on trial." He noted that, "Assuming . . . that as a matter of local law these statements are admissible, there would then arise the question whether under the Fourteenth Amendment a coerced statement may be excluded on objection of one not coerced into making it." And, in *United States v. Wolfe*, 307 F.2d 798, 801 (7th Cir. 1962), the court of appeals stated:

> "We are not unmindful that a case might well arise where the procurement of evidence to be used in a federal prosecution might have been obtained by proved coercion violative of the constitutional rights of a *witness* and that a serious question might arise in that event upon the use of such evidence upon the trial of *defendant*."

This petition squarely prevents this "serious question" of constitutional law. It has never been squarely considered by the Court. Certiorari should be granted to resolve it.[27]

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[27]It is appropriate that this question be resolved initially in a case coming from the federal courts rather than a state case. *Cf. People v. Portelli*, 15 N.Y.2d 235, 205 N.E.2d 857 (N.Y.Ct.App. 1965), *cert. denied*, 382 U.S. 1009 (1966). That case was a direct appeal from a state court; federal habeas corpus was available there to litigate these issues, with later review by the Supreme Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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